Supreme Court, U.S.
FILED
JUL 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-1656

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALBERT PEREZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1656

ALBERT PEREZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the indictment should have been dismissed because the government deported potential alien witnesses.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

United States v. *Calzada*, 579 F. 2d 1358 ..... 4, 5, 6, 7, 8

United States v. *Carrillo-Frausto*, 500 F. 2d 234 ..... 5, 7

United States v. *Castellanos-Machorro*, 512 F. 2d 1181 ..... 6, 7, 8

United States v. *Gonzales*, 617 F. 2d 1358 ..... 6, 7, 8

United States v. *Hernandez-Gonzalez*, 608 F. 2d 1240 ..... 6, 7

United States v. *Lopez*, 615 F. 2d 1363 (Table), petition for cert. pending, No. 79-6554 5

United States v. *Lovasco*, 431 U.S. 783 6

United States v. *Lujan-Castro*, 602 F. 2d 877 5

United States v. *Mendez-Rodriguez*, 450 F. 2d 1 ..... 4, 6, 7

Page

Cases—(Continued):

United States v. *Neustice*, 452 F. 2d 123 5

United States v. *Powell*, 498 F. 2d 890 5

United States v. *Romero*, 469 F. 2d 1078, cert. denied, 410 U.S. 985 ..... 5, 6, 7, 8

United States v. *Sanchez-Murillo*, 608 F. 2d 1314 ..... 6, 7, 8

United States v. *Tsutagawa*, 500 F. 2d 420 7

Constitution and statutes:

United States Constitution:

Fifth Amendment 4, 7

Sixth Amendment 4, 7

8 U.S.C. 1324(a)(2) 1

8 U.S.C. 1324(a)(4) 1

18 U.S.C. 371 1

OPINION BELOW

The opinion of the court of appeals (Pet. App. 14-48) is reported at 610 F. 2d 1266.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1980. A petition for rehearing was denied on February 28, 1980. The petition for a writ of certiorari was filed on March 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Following a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of conspiring to induce the entry of illegal aliens into the United States (8 U.S.C. 1324(a)(4)) and to transport illegal aliens (8 U.S.C. 1324(a)(2)), in violation of 18 U.S.C. 371. In addition, petitioner Perez was convicted on eight counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2). Petitioners were sentenced to five years' imprisonment on the conspiracy charge, and petitioner Perez also received a sentence of five years' imprisonment on each substantive count, suspended in favor of probation, the sentences to run concurrently with each other but consecutive to the sentence on the conspiracy count. Petitioner Salazar was also fined $5,000, and petitioners Perez and Sanchez were each fined $2,500. The court of appeals affirmed (Pet. App. 14-48).[1]

---

[1]Co-defendant Maximo Avila-Dominguez, himself an illegal alien (Tr. 94), was also convicted on one count of conspiracy and six counts of inducing illegal aliens to enter the United States, and was sentenced to five years' imprisonment on the conspiracy offense to be followed by concurrent terms of five years' imprisonment on the substantive offenses, also suspended in favor of probation. He has not joined in this petition.

a. The evidence at trial established that petitioners arranged for the illegal entry and transportation of 22 Mexican nationals from Juarez, Mexico, to El Paso, Texas. In April 1978, petitioners Perez and Sanchez met with various aliens at a hotel in Juarez. Each alien agreed to pay petitioners between $200 to $400 for being escorted into this country and for transportation to either Chicago or Denver. Accordingly, on the morning of April 22, 1978, Perez led the group of aliens to a house on the outskirts of Juarez, from which they were taken in small groups to the banks of the Rio Grande River. There, co-defendant Maximo Avila-Dominguez joined the group and, after first crossing the river himself, signaled to the awaiting aliens that it was safe to cross. The 22 Mexicans then crossed over into this country and were led to a pickup truck owned by petitioner Salazar. At that time, each alien paid either Avila-Dominguez or Sanchez an initial $25 fee (Tr. 147-157, 193-199, 220-233, 267-276, 289-297, 312-317, 324-331, 343-346).

Acting on an informant's tip and surveillance, INS agents followed Salazar to the pickup truck, where she rendezvoused with Avila-Dominguez, Sanchez, and Perez. Perez entered the pickup truck and drove away with the 22 aliens. Thereafter, while one of the agents arrested Salazar, Avila-Dominguez, and Sanchez, another agent followed Perez for a short distance and then arrested him. Thereupon, the INS official discovered the 22 aliens in the back of the truck driven by Perez. While searching Sanchez, the agents also found a partial list of the aliens' names. And in response to questioning, Salazar admitted that she drove from Denver to El Paso to pick up the aliens, whom she knew to be in this country unlawfully, and to transport them back to Denver (Pet. App. 22-23; Tr. 42-54, 87-99, 112-116; Gov't Exh. 4).

b. The INS officials also took the 22 illegal aliens into custody on April 22, 1978. The aliens were processed at that time and three of them—the only female alien and her two children—agreed voluntarily to return to Mexico that day (Tr. 100-103, 139).[2] Two days later, defense counsel inquired about the names and location of the aliens but made no further efforts to investigate or to interview the aliens (Pet. App. 23-24, 30-31). Ten days after petitioners' arrest, 11 of the remaining aliens were deported (Tr. 102, 125). Subsequently, petitioners were charged with overt acts and substantive counts solely with regard to the eight remaining Mexicans (Pet. App. 35).

2. Prior to trial, petitioners moved to dismiss the indictment on the ground that the government had deported 14 of the 22 aliens without making them available to the defense or furnishing their names. In response, the government pointed out that petitioners had had an opportunity to interview at least 11 of these witnesses prior to deportation and that the other three aliens (two of whom were children) had voluntarily departed. In addition, an affidvait of the INS criminal investigator stated that the stories told by the aliens who were returned to Mexico were essentially the same as the accounts related by the eight aliens still being held (Pet. App. 35; Tr. 125-126). The district court denied the motion to dismiss, although it ordered the government to furnish petitioners with the names and addresses of the deported aliens. Thereafter, petitioners were convicted on the various charges described above.

---

[2]There were limited facilities to house female aliens and no facilities to house children (Tr. 101).

On appeal, the court of appeals rejected petitioners' due process and compulsory process contentions regarding the deported aliens. The court initially stated that it "agree[d] with the Ninth and Seventh Circuits that a criminal defendant's constitutional rights are violated if an alien witness is deported before the defendant is given opportunity to interview the witness" (Pet. App. 29). The court held, however, that dismissal of the indictment was inappropriate here for two reasons. First, the court observed that petitioners' "case is flavored with an element of waiver," because petitioners' counsel failed to interview the aliens in the ten days prior to their deportation despite his awareness of their whereabouts (*id.* at 29-33). Further, the court concluded that petitioners had utterly failed to suggest how the testimony of the deported witnesses would have been at all helpful to their defense (*id.* at 33-36).

ARGUMENT

Relying on *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (9th Cir. 1971), and *United States* v. *Calzada*, 579 F. 2d 1358 (7th Cir. 1978), petitioners contend (Pet. 7-11) that the government violated their Fifth and Sixth Amendment rights by deporting 11 aliens, who were potential witnesses, prior to trial. Therefore, in petitioners' view, the courts below should have dismissed the indictment against them even though the specific charges at issue related directly only to aliens who had not been deported by the government. The court of appeals correctly rejected these claims both because petitioners failed to interview the aliens prior to deportation despite a substantial opportunity to do so and also because the deportations did not prejudice petitioners' defense. And contrary to petitioners' contentions, the decision in the instant case is consistent with the relevant decisions of the Seventh and Ninth Circuits.

1. Petitioners failed to interview or otherwise to preserve the testimony of the 11 aliens who were deported,[3] despite a substantial opportunity to do so prior to their deportation. The INS agents arrested petitioners and the aliens on April 22, 1978. Although petitioners' counsel was fully aware of the status and circumstances of the aliens at that time (Pet. App. 30-31), he made no attempt to contact or interview any of the incarcerated aliens in the 10-day period between their arrest and deportation. In these circumstances, as the court of appeals suggested (*id.* at 29-33), petitioners may not now be heard to complain. See, *e.g.*, *United States* v. *Lopez*, 615 F. 2d 1363 (Table) (6th Cir. 1980), petition for cert. pending, No. 79-6554; *United States* v. *Lujan-Castro*, 602 F. 2d 877 (9th Cir. 1979); *United States* v. *Romero*, 469 F. 2d 1078, 1079 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973); see also *United States* v. *Neustice*, 452 F. 2d 123 (9th Cir. 1971). Otherwise, the government would be required to retain custody over large groups of aliens for indefinite periods of time at a tremendous cost in both practical and humanitarian terms.

Furthermore, petitioners, who were arrested as they were transporting the illegal aliens from the border area,[4] have never suggested how the aliens' putative testimony

---

[3]No independent claim is apparently made regarding the voluntary departure of the two juveniles and their mother, who were released for humanitarian reasons. Both the Seventh and Ninth Circuits have recognized that the government may release a juvenile illegal alien in appropriate circumstances. See *United States* v. *Calzada*, *supra*, 579 F. 2d at 1361; *United States* v. *Carrillo-Frausto*, 500 F. 2d 234, 235 (9th Cir. 1974).

[4]In addition, we note that petitioner Salazar admitted that she knowingly participated in the transportation of the illegal aliens (Tr. 98-99). Cf. *United States* v. *Powell*, 498 F. 2d 890 (9th Cir. 1974).

could possibly have aided their defense. The eight aliens who were not deported uniformly and thoroughly implicated petitioners in the illegal immigration conspiracy, and the INS agent testified that the other deported aliens all made virtually identical inculpatory statements regarding petitioners. Since "proof of prejudice is generally a necessary but not sufficient element of a due process claim" (*United States* v. *Lovasco*, 431 U.S. 783, 790 (1977)), petitioners' failure to establish that the deportation of some of the aliens actually prejudiced their defense is fatal to their contentions here. Accord, *United States* v. *Gonzales*, 617 F. 2d 1358, 1363 (9th Cir. 1980); *United States* v. *Sanchez-Murillo*, 608 F. 2d 1314, 1317-1318 (9th Cir. 1979); *United States* v. *Hernandez-Gonzalez*, 608 F. 2d 1240, 1245-1246 (9th Cir. 1979); *United States* v. *Castellanos-Machorro*, 512 F. 2d 1181, 1184 (9th Cir. 1975); *United States* v. *Romero*, *supra*.[5]

2. Petitioners erroneously contend that the decision below is in conflict with various decisions of the Ninth and Seventh Circuits. In *United States* v. *Mendez-Rodriguez*, *supra*, a divided panel of the Ninth Circuit reversed a conviction for conspiring to smuggle and for transporting illegal aliens. The court held that the government's immediate return to Mexico of three of the six alien witnesses deprived the defendant of an opportunity to

---

[5]To be sure, where the government immediately deports material alien witnesses, thereby depriving a defendant of any opportunity to interview such witnesses, some courts have concluded that it may be appropriate to presume that the aliens might have been able to give testimony materially helpful to the defense. See, *e.g.*, *United States* v. *Mendez-Rodriguez*, *supra*; *United States* v. *Calzada*, *supra*. Here, of course, petitioners had ample opportunity to interview the aliens, and, accordingly, the normal burden of "proof of actual prejudice" (*United States* v. *Lovasco*, *supra*, 431 U.S. at 789) rests upon petitioners.

interview those potential defense witnesses and therefore violated his Fifth and Sixth Amendment rights. 450 F. 2d at 5. *Mendez-Rodriguez* was followed in *United States* v. *Tsutagawa*, 500 F. 2d 420 (9th Cir. 1974), and *United States* v. *Calzada*, *supra*.[6] In both cases, however, the court of appeals based its decision on the fact that the government's action had deprived the defendant of any opportunity to interview the alien witnesses. See 500 F. 2d at 422; 579 F. 2d at 1362. In addition, both decisions noted that the defendants made good faith efforts to locate the missing witnesses after their deportation. See 500 F. 2d at 422; 579 F. 2d at 1360 n.5. Finally, both decisions emphasized that reversal was not required in every case in which the government deports a putative alien witness. See 500 F. 2d at 422; 579 F. 2d at 1361.[7]

It is thus apparent that petitioners' reliance on *Mendez-Rodriguez*, *Tsutagawa*, and *Calzada* is misplaced. The court of appeals in this case expressly "agree[d] with the Ninth and Seventh Circuits that a criminal defendant's constitutional rights are violated if an alien witness is deported before the defendant is given opportunity to interview the witness" (Pet. App. 29). Here, however, in contrast to the situations in *Mendez-Rodriguez*, *Tsutagawa*, and *Calzada*, petitioners were given an opportunity to interview the witnesses prior to deportation, but they neither contacted the aliens while in

[6]In *Calzada*, a divided panel of the Seventh Circuit concluded that the district court did not abuse its discretion in dismissing the indictment. 579 F. 2d at 1363.

[7]The Seventh Circuit has not had occasion to apply or reconsider the *Calzada* decision. The Ninth Circuit has repeatedly upheld convictions over *Mendez-Rodriguez* claims. See, *e.g.*, *United States* v. *Gonzales*, *supra*; *United States* v. *Sanchez-Murillo*, *supra*; *United States* v. *Hernandez-Gonzalez*, *supra*; *United States* v. *Castellanos-Machorro*, *supra*; *United States* v. *Carrillo-Frausto*, *supra*; *United States* v. *Romero*, *supra*.

custody nor attempted to locate them thereafter. Moreover, petitioners failed to suggest how they " 'could conceivably' benefit from [the] missing witness[es'] testimony [or how they were] prejudiced by the[ir] absence." *United States* v. *Gonzales*, *supra*, 617 F. 2d at 1363. In such circumstances, neither the Seventh nor the Ninth Circuit would reverse petitioners' convictions. See, *e.g.*, *ibid*; *United States* v. *Sanchez-Murillo*, *supra*, 608 F. 2d at 1318; *United States* v. *Calzada*, *supra*, 579 F. 2d at 1362; *United States* v. *Castellanos-Machorro*, *supra*, 512 F. 2d at 1183-1184; *United States* v. *Romero*, *supra*, 469 F. 2d at 1079.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA CRISCITELLI
Attorney

JULY 1980

DOJ-1980-07